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IN THE

Supreme Court of the United States

October Term, 1950
No. 453

RAY H. GARNER, HARRY BECKERMAN, AIDA BELDNER, JOHN B. BROWN, CARRIE L. DICK, MARY E. GRUNEWALD, EUGENE HALLETT, MARGARET B. HASKELL, EDWARD HAVENS, CORNELIUS LAWRENCE, VERA MANN, OLA ROSS PACIFICO, DANA PLATT, EUGENE REED, FRANCES SCHWARTZ, WILLARD SMART, FRANK TORREANO,

Petitioners,

vs.

BOARD OF PUBLIC WORKS OF THE CITY OF LOS ANGELES; CLARENCE J. DERRICK, JOSEPH O. DONOVAN, LOUIS M. DREVES, FRANK GILLELEN, EDWARD L. TAYLOR and MILTON OFFNER, as Members of the Board of Public Works of the City of Los Angeles, BOARD OF CIVIL SERVICE COMMISSIONERS OF THE CITY OF LOS ANGELES; SAMSON A. LINDAUER, JUSTIN W. GILLETTE, CHARLES E. ARNN, RANSOM M. CALLICOTT, and MRS. IDA S. LAZARD, as Members of the Board of Civil Service Commissioners of the City of Los Angeles; DAN O. HOYE, City Controller of the City of Los Angeles; THE CITY OF LOS ANGELES, a Municipal Corporation,

Respondents.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

To the Honorable Fred M. Vinson, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully urge this Court to grant them a rehearing upon the decision and judgment rendered in this cause on June 4, 1951.

1. Procedurally, the majority decision of this Court appears to have overlooked the fact that its interpretation

of the Ordinance, which the majority "felt justified in assuming," has not been embodied *into law*, that is, there is no state judgment which carries out the mandate of this Court and upon which the petitioners can rely or otherwise enforce.

The assumption by the majority of the Court that "scienter is implicit in each clause of the oath" because in a criminal case, *People v. Steelik*, 187 Cal. 361, 203 Pac. 78 (1921), the California Supreme Court imported "knowledge" into the literal text of a criminal syndicalism statute, does not appear to rest on a sound legal basis.

The instant case, in the first place, arose in a state jurisdiction. This is a local ordinance embodying an oath provision which has been construed broadly and without limitation by the courts of the State of California. (*Garner v. Board of Public Works*, 98 Cal. App. 2d 493, 220 P. 2d 958.) So far as the instant case is concerned, that construction will remain unmodified in law because of the affirmance of the judgment below. This is, of course, entirely different from the situation in *Geronde v. Board of Supervisors*, 341 U. S. 50, where the highest court in the State of Maryland had construed the statute in a limited manner, which construction this Court affirmed. The petitioners in the *Geronde* case, therefore, had a judgment which they could enforce. The petitioners here have no such judgment.

In the second place, where in a criminal prosecution the word "knowingly" is imported into a governing statute and the indictment thereunder, the defendants' only injury, if any, is that he may be convicted on a charge under a statute which by its original indefiniteness left him unapprised of what he could or could not do. Other than that, the defendant need do nothing except to hold the prosecu-

tion to the additional burden which the law has imposed. But the ordinance here compels initially an affirmative act on the part of the petitioners, and an affirmative act of a solemn nature. It requires that an *oath* be taken, that a person *swear* that he has not engaged in certain proscribed activities. "An oath is an appeal by a person to God to witness the truth of what he declares, and an imprecation of Divine punishment or vengeance on him if what he says is false, and its purpose is to secure the truth." 67 Corpus Juris Secundum, Sec. 2, p. 4. Under such circumstances, there would appear to be a lack of due process to compel a person to take an oath different in context from that which a majority of this Court "assumes" was intended by the language of the Ordinance. Especially is this true where objections to the oath originally were made on the basis of conscience.

In the third place, the majority of this Court has done more than import scienter into the oath. It has construed scienter as excluding "persons who during their affiliation with a proscribed organization were innocent of its purpose, or those who severed their relations with any such organization when its character became apparent, or those who were affiliated with organizations which at one time or another during the period covered by the Ordinance were engaged in proscribed activity but not at the time of affiant's affiliation." There is nothing in *People v. Steelik*, nor any other California decision, which intimate that such interpretations of the word "knowingly" will be read into the text of an oath provision. Unless, therefore, the decision of this Court is embodied into the judgment of the state court, there can be no certainty that the rights of the petitioners will be safeguarded. The resultant confusion may place additional and perhaps insuperable

burdens upon petitioners, requiring them to engage in additional litigation if the state courts and officials at any time take a different view of the nature of this Court's decision.

Without conceding the correctness of the majority's decision, it is therefore respectfully submitted that the judgment of the state court should have been reversed or vacated, with instructions to proceed consistent with the Court's opinion. Due deference to both state courts and lower federal courts have led constantly to this result in analogous cases. Compare, *Musser v. Utah*, 333 U. S. 95; *Maggio v. Zeitz*, 333 U. S. 56, 77. Such a judgment will at least entitle the petitioners to reinstatement until they are presented with a proper oath in conformity with this Court's opinion, at which time the rights of all parties to this dispute will have been delineated by the judgment of this Court as embodied in the judgment of the state court.

2. So far as the oath provision of the Ordinance is concerned, the majority opinion is contrary to the decision of this Court in *Cummings v. Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 330, and *United States v. Lovett*, 328 U. S. 303, as well as the express prohibitions of the Constitution (Article I, Section 10) considered in the light of history and the intendment of the founders of the nation.

The majority opinion reasons, in effect, that because the Charter amendment defined "standards of eligibility" in 1941, therefore the Ordinance is valid because it merely provides "administrative implementation" for the provisions of the Charter. As the record demonstrates, the Ordinance was not "administrative implementation" but "legislative implementation." It is the legislature which effected the discharge of petitioners and this not after an "administrative hearing," which was only a mask, but by

force of the legislative act itself. How did the legislature or any court of law know that these petitioners were "ineligible" under the Charter? It was not because of any accusation, evidence, hearing, or judgment. This Court has simply affirmed the assumption of the legislature that the petitioners were "ineligible" because they refused to sign a test oath. It is the legislature which deprived the petitioners here of their avocations without hearing. This Court by its judgment now affirms that legislative determination, asserting that the municipality is entitled to "loyalty" although no one, not even the City of Los Angeles, has ever alleged or proved that the petitioners were disloyal.

The error of the majority opinion, it is respectfully submitted, arises from the confusion of the question of *ex post facto* with the question of bill of attainder. The fact that the Charter was amended in 1941 while the oath provision, adopted in 1948, ran back to 1943, affects the question of *ex post facto*. In this respect, the Ordinance may not create ineligibility where eligibility existed before, but it does at least subvert the presumption of innocence and alter the rules of evidence. Compare, *Cummings v. Missouri*, 4 Wall. 277, 328. Insofar as bill of attainder is involved, however, whether prior conduct was criminal or innocent is not decisive. In the *Cummings* and *Garland* oaths, past criminal conduct—active rebellion to overthrow the government by force and violence—was involved. Indeed, in the case of Garland this could hardly be denied. Yet the oath which Cummings and Garland were compelled to take was held by this Court to be unlawful, and unlawful because "in all these cases there would be the legislative enactment creating the deprivation, without any of the ordinary forms and guards provided for the security

of the citizen in the administration of justice by the established tribunals" (p. 325). Of course all cases agree that the government may prescribe rational qualifications for employment. But until the decision herein, all cases have also agreed that deprivation of employment for past conduct is punishment, that in such cases the issue is one of disqualification, not qualification, and that such deprivation of employment by legislative act without process administered by other arms of government is attainder. To state that *United States v. Lovett, supra,* is distinguishable because no prior standards of eligibility had existed in that case is to overlook the fact that at no time prior to the *Lovett* decision was any "subversive" person, assuming the word is capable of definition, ever eligible for employment by the Government of the United States. The statute in the *Lovett* case was held unconstitutional, not because there were no prior standards of eligibility, but because named individuals were excluded from their chosen avocations by legislative act without judicial hearing. Clearly, the *Lovett* case is not distinguishable because in that case the persons were specifically named. This Court in the *Cummings* and *Garland* cases pointed out the fallacy of attempting to distinguish bills of attainder which named specific individuals and those which provided for test oaths. "The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate, and instead of lessening, increases its objectionable character." *Ex parte Garland, supra,* p. 377.

3. While this Court sits the right of the citizen to be free from compulsory "loyalty" oath taking has been steadily retrogressing. It is a far cry from the position of Chief Justice Stone in *Minersville v. Cobitis* (310 U. S. 586), wherein the government was held to be without constitu-

tional power to demand that expression of loyalty implicit in the flag salute ceremony (a minority position which became this Court's majority view in *West Virginia v. Barnette,* 319 U. S. 624) to the recent *Douds* case wherein an oath as to present or future loyalty was upheld; and an even greater jump backwards has now been made, and right into the instant situation wherein an inquiry is allowed as to past loyalty. True this Ordinance reaches back only five years; but granted the initial power, why cannot government go back ten, fifteen or seventy-five years? And if this Court concedes this retrospective power to be constitutional, what then happens even to the narrow limitations imposed by *Geronde* (341 U. S. 56) and by *Douds?*

Fortunately, we have not yet in America come to the Hitlerian stage at which his inquisitors reached out to the great great grandparents of the accused to find the "taint" which justified the blacklisting of assumed anti-nazis. And therefore we urge this Court, before it is too late, to squarely answer the question involved in this Ordinance dealing particularly with past membership and past affiliation. We submit respectfully that it is no answer to say, as the majority here says, that "past conduct may well relate to present fitness." Can anyone seriously assert that what a tree trimmer may have advocated in the political arena five years ago may affect his present fitness to trim a tree, or that what a typist in the ordinary clerical posts may have taught four years ago, may well relate to her present fitness to type a letter as required by her supervisor? If so, then under all the authorities of this Court, this Ordinance would still be unconstitutional for then the state would be required to select that one of the many methods available to it to assure fitness of employees which impinges least upon constitutional rights otherwise existent.

And with respect to this Court's observation that "past conduct may well relate to present fitness" we ask this Court to reconsider, as we have, what was said in *Cummings v. Missouri;* for this was the precise argument made by the State of Missouri—and rejected by Mr. Justice Field notwithstanding that the past conduct there related to acts heinous as actual armed rebellion against the state. Could not past participation in an armed rebellion be said to relate more nearly to present fitness to serve the state, then past advocacy of the doctrine of rebellion? And yet the Supreme Court in *Cummings* threw over the loyalty oath. Is this Court not then reversing *Cummings* here, *sub silentio?*

The majority here relies upon *Hawker v. New York*, 170 U. S. 189 and upon *Dent v. West Virginia*, 129 U, S. 144. In *Hawker* the statute excluded from the practice of medicine those who had been *convicted* of abortion. Not only is there a direct relationship between the act of abortion and the right to practice medicine, but over and above this Hawker was not disqualified until *first* convicted; Hawker was not disqualified because he failed to take an oath; he was disqualified because he had had his day in Court and after trial had been found guilty. The state here does not contend that these petitioners ever had a trial to determine whether they were or were not members or advocates of the proscribed organizations or doctrines; they were disqualified only for failure to take the demanded oath, not because of proof of guilty advocacy or membership. The difference is the difference between democratic due process and autocracy—no more, no less.

Dent v. West Virginia, 129 U. S. 114, is even less apposite. There the state merely required those who would practice medicine to present credentials from accredited

medical schools. The reasonableness of the requirement is as patent as is the fact that disqualification there did not flow from a failure to take an oath, but rather from a failure to show evidence of a qualification germane to the calling. In *Dent* no special class was signalled out for discriminatory treatment, and no oath was utilized as the device to identify the group selected for punishment by a legislature without hearing.

4. As to the affidavit requirement, this Court apparently agrees that there is here a legislative imputation of disloyalty, but finds no constitutional infirmity since the Ordinance does not call for discharge in the event that the individual swears he was a member of the Communist Party or the Communist Political Association. But the majority of this Court holds that since 1943, persons who were members of organizations which forcibly advocated the overthrow of government were ineligible for office in the City of Los Angeles. Since the affidavit provision was enacted to "effectuate the objects" of the Charter, it can only mean that the legislature has "found" that the Communist Party and Communist Political Association advocate the proscribed doctrines, and that members of these two organizations are therefore ineligible to hold office. Under this Court's view of the record, and this was also the position of the City expressed in its brief and oral argument, no person who was a member of the two named organizations could work for the City. The Ordinance, in the light of the Charter, is therefore as much a bill of attainder as the oath provision itself.

Moreover, this Court appears to have overlooked the broad implications of its decision with respect to the affidavit provision. This affidavit deals with two *named* organizations and it is justified upon the ground that it is relevant to an inquiry into the "loyalty" of employees. Here are no general standards affecting all organizations. Here, guilt or the presumption of guilt—of disloyalty—has been imputed to two named organizations. This is clearly arbitrary and a usurpation by the legislature of judicial function. If the legislature can impute disloyalty to any organization with judicial hearing, why may not it impute such unlawfulness to a dozen or one hundred other organizations, political, economic or social? Compare *Joint Anti-Fascist Refugee Committee v. McGrath*, 95 L. Ed. Adv. 556. It is one thing for the municipality to proscribe membership in organizations generally which are unlawful; it is quite another thing for the legislature to proscribe membership in the "X", "Y" and "Z" organizations because the legislature believes membership in such named organizations to be incompatible with "loyalty."

Not only do such latter statutes disregard the doctrine of separation of powers, but they lay burdens on the exercise of First Amendment rights and coerce opinion by visiting discharge and stigma upon those who were and are members of such organizations. If, as this Court stated in *Dennis v. United States*, decided June 4, 1951, a legislature cannot "eradicate the free discussion of political theories" nor "destroy the traditional rights of Americans to discuss and evaluate ideas without fear of gov-

ernmental sanction," by what right did the Council of the City of Los Angeles "find" that certain named organizations were disloyal or presumptively disloyal, and that citizens were required, as relevant to a "loyalty" inquiry, to swear whether or not they had been members of such organizations? How can there be freedom of discussion if organizations and their members can be proscribed by legislative fiat without judicial trial?

5. The petitioners respectfully submit that all compulsory "loyalty orders" are inherently unconstitutional and that no decisive distinction exists between the situation presented here and that presented in *West Virginia State Board of Education v. Barnette*, 319 U. S. 624. The loyalty oath here is not concerned with qualifications or fitness for office. It is avowedly aimed at compelling loyalty, at compelling adherence to organized government even where the existing structure of the government provides no means of peaceful and orderly change. There are no limits on this oath. Such a compulsory test oath of loyalty has no place on the American scene, past, present or future.

6. Such decisions as *Geronde v. Board of Supervisors*, 341 U. S. 56 and *American Communications Ass'n v. Douds*, 339 U. S. 382, are clearly distinguishable from the situation here. These petitioners are not *candidates for appointment* to office. They are not knocking at the door of the National Labor Relations Board. They are citizens who *occupy office* and as such are entitled to hold office, not as a matter of grace, but as a matter of legal right

under the Constitution. An *applicant* for a position in government employ may have narrow room to argue lack of due process, but a citizen who has met all requirements and obtained office has a right to invoke the guarantees which every citizen enjoys against governmental lawlessness, unless government is above the law.

The petition for rehearing should be granted.

Respectfully submitted,

CHARLES J. KATZ,
Counsel for Petitioners.

SAMUEL ROSENWEIN,
Of Counsel.

Certificate of Counsel.

I certify that this petition for rehearing is presented in good faith and not for delay.

CHARLES J. KATZ,
Counsel for Petitioners.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of June, A, D. 1951.

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6-15-51—60